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No. 09-627

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2009

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Petitioner,

V.

ERIC LYNN MOORE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THIS IS A DEATH PENALTY CASE.

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CAPITAL CASE

QUESTIONS PRESENTED (RESTATED)

1. Should this Court grant plenary review to address the correctness of the unanimous, *per curiam* opinion of the *en banc* Court of Appeals when the class of similarly-situated *Atkins* complainants who would be affected by a decision is minuscule or non-existent, and the Respondent would likely prevail on other grounds that the court below never addressed?

2. Should this Court devote its limited resources to determine whether Texas has adopted a bright-line cut-off I.Q. score of 70 when the Petitioner never advanced the argument below; the Texas Court of Criminal Appeals or the Texas legislature can clarify any perceived misinterpretation of state law implementing *Atkins*; and the unpublished decision of the Court of Appeals is binding on no one but the parties?

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Respondent Eric Lynn Moore asks this Court to deny Petitioner Rick Thaler's petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to 28 U.S.C. § 2254(b)(1), this case involves two constitutional provisions:

1. The Eighth Amendment, which provides that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. The Fourteenth Amendment, which provides, in relevant part, that "No state may deprive any person of life [or] liberty . . . without due process of law."

STATEMENT OF FACTS

I. Facts Regarding Exhaustion Issue

A. Texas's Subsequent Application Procedures

For a death row inmate like Mr. Moore, who had already filed his first state habeas petition before this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), a subsequent habeas application pursuant to Article 11.071 of the Texas Code of Criminal provides the only available state-court remedy to vindicate the substantive Eighth Amendment *Atkins* right. However, Article 11.071 contains no provisions "for the appointment of counsel, or for investigative or expert funding, for the preparation of subsequent writ applications, as it does for preparation of an initial writ application." *Ex parte Blue*, 230 S.W.3d 151, 166-67 (Tex. Crim. App. 2007). In *Blue*, the Texas Court of Criminal Appeals ("CCA") admitted its inability to resolve the dilemma facing volunteer counsel representing indigent death row inmates in successive habeas proceedings:

> This means that *pro bono* subsequent writ counsel is put in the unfortunate position of having to choose whether to personally bear the costs of expert and investigative assistance, raise the costs himself from private charitable sources, file a writ application without such assistance that will almost surely fall short of the statutory burden, or file no writ application at all despite his good faith suspicions. This is a regrettable dilemma for any attorney to have to face who is already giving generously and commendably of his own time. But it is one we are not at liberty to solve for him, in light of the legitimate legislative judgment as expressed in the statute. Counsel for the applicant, and others similarly situated, must present their dilemma for the consideration of the Legislature.

Id. at 167.

In *Blue*, the CCA noted that the subsequent application provisions do not pose a problem for legitimate *Atkins* applicants who filed their first habeas petitions before *Atkins* was decided: "Subsequent applicants ***who can make the requisite threshold showing*** have been able to rely upon Article 11.071, Section 5(a)(1) for authority to proceed on the merits." 230 S.W.3d at 156 n.20 (emphasis added).[1] One CCA judge sought to define the threshold showing:

> [A]n applicant must, at a bare minimum, provide evidence of at least one I.Q. test (preferably taken before the age of 18) from which a reasonable trier of fact could conclude that the person is mentally retarded under *Atkins*. Better yet is evidence of several such I.Q. tests, coupled with supporting school and medical records, and record evidence or affidavits from qualified experts (or laymen with sufficient personal knowledge of specific conduct) that at least raise an issue concerning applicant's lack of adaptive skills and the onset of mental retardation before age 18.

Ex parte Williams, 2003 WL 1787634, at *2 (Tex. Crim. App. Feb. 26, 2003) (Cochran, J., concurring) (unpublished). A few months later, in another opinion concurring in the dismissal of a successive *Atkins* petition, Judge Cochran reiterated her position in *Williams* but this time acknowledged that "an indigent death row inmate usually does not have the financial or investigative resources necessary to provide full documentation of an *Atkins* claim when filing a

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[1] Section 5(a)(1) provides:

> [A] court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> > (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application[.]

Tex. Code Crim. P. art. 11.071 § 5(a)(1) (West 2009).

subsequent application." *Ex parte Jacobs*, No. 34,253-04 (Tex. Crim. App. May 12, 2003) (Cochran, J., concurring) (unpublished)).

By contrast, a death row inmate challenging his conviction and sentence in a first state habeas application need not make any threshold showing to be entitled to appointed counsel to prepare the application. *See* Tex. Code Crim. P. art. 11.071 § 2(a) (providing that "[a]n applicant shall be represented by competent counsel"). To obtain prepayment of funds for investigators or experts to develop a claim for a first petition, an applicant need only state "specific facts that suggest that a claim of possible merit may exist." Tex. Code Crim. P. art. 11.071 § 3(b)(2). The applicant would, of course, have the assistance of appointed counsel to prepare the motion for funds. The State of Texas reimburses the counties for the cost of appointed habeas counsel's services and expenses on a first habeas application up to $25,000. Tex. Code. Crim. P. art. 11.071 § 2A(a). Counties may reimburse appointed counsel for fees and expenses exceeding that amount. Tex. Code Crim. P. art. 11.071 § 2A(c).

B. **The State-Court *Atkins* Proceedings**

Only six months after *Atkins*, and eight days after the United States Court of Appeals for the Fifth Circuit denied his petition for rehearing in his initial federal habeas corpus proceedings, Mr. Moore filed a successive state habeas petition raising an *Atkins* claim. Because Mr. Moore was indigent, and Article 11.071 did not entitle him to counsel to prepare the successive petition, his federal habeas counsel represented him *pro bono*. Counsel relied solely on the reporter's record of the capital murder trial to support the *Atkins* claim, because Article 11.071 did not give Mr. Moore the right to fact-development resources, and *pro bono* counsel was unable to pay for an investigator or expert out of his own pocket.

Mr. Moore referred repeatedly to this Court's recent decision in *Atkins*, in both the title of his pleading ("Successor Application for Post-Conviction Relief Pursuant to Article 11.071 § 5 and *Atkins*") and throughout the text. He specifically alleged that his execution "would violate the Eighth Amendment as cruel and unusual punishment, as he is retarded and mentally impaired." Citing the trial record, Mr. Moore set out concrete allegations of mental retardation. Dr. Jay Crowder, a psychiatrist, testified that Mr. Moore's intellectual abilities were "clearly below average." He testified that Mr. Moore scored a 74 on a school-administered I.Q. test. Mr. Moore attached the testimony of a psychiatrist in an unrelated case that indicated that such an I.Q. score was within the range of mental retardation. Dr. Crowder also testified that Mr. Moore was in special education throughout school. Referring to the trial record, Mr. Moore alleged that he had suffered multiple head injuries, which compounded his low level of intellectual functioning. Dr. Crowder testified that Mr. Moore had probably sustained damage to his brain that could cause violent, irritable, uncontrolled, or disinhibited behavior. In sum, Mr. Moore presented evidence relating to each of the elements defining mental retardation: his 74 I.Q. score is within the range of significantly subaverage intellectual functioning; his attendance in special education classes indicates an adaptive deficit in conceptual skills; and both his I.Q. score and participation in special education classes occurred while he was in school, suggesting onset before the age of eighteen. *See* American Association on Mental Retardation ("AAMR"), *Mental Retardation: Definition, Classification, and Systems of Supports* 1 (10th ed. 2002) (defining mental retardation).

Mr. Moore explicitly called to the state court's attention *Atkins*'s command that the States "develop appropriate ways to enforce" the Eighth Amendment's categorical rule exempting the

mentally retarded from capital punishment. He noted that the Fifth Circuit had held that *Atkins* applied retroactively, but that this Court had not provided any guidance on how to apply its ruling to prisoners who had already been convicted and sentenced to death before *Atkins* was decided. He added that the CCA had not issued any published decisions defining mental retardation.

Mr. Moore reminded the state court of his indigence, and asked it to provide him with "an opportunity to be evaluated." He also asked the state court to "allow him a constitutionally sufficient period within which to file such amendments to [his] application as may be necessary to bring all proper matters before the Court and avoid unnecessary piecemeal litigation." Finally, Mr. Moore asked the court to hold an evidentiary hearing.

In a separate motion filed simultaneously with his subsequent application, Mr. Moore attached an Affidavit of Inability to Pay Court Costs and asked the state court to appoint counsel "to prepare and file a successor writ of habeas corpus ordering that his death sentence be vacated." He asked the court to appoint his federal habeas counsel, who was "willing [to] accept and pursue Mr. Moore's case in the Courts in the State of Texas under appointment." Finally, Mr. Moore asked the state court to allow him to continue to proceed *in forma pauperis*.

The CCA implicitly denied Mr. Moore's request for counsel, an expert evaluation, an opportunity to amend the application, and an evidentiary hearing. Dismissing the application as abusive, the CCA found that the *Atkins* claim "fails to contain sufficient facts which would satisfy the requirements of Art. 11.071, Sec. 5(a), V.A.C.C.P." *Ex parte Moore*, No. WR-38,670-02 (Tex. Crim. App. Feb. 5, 2003) (unpublished).

C. **The Federal-Court *Atkins* Proceedings**

1. **The Authorization Proceedings**

On February 11, 2003, only six days after the CCA dismissed his *Atkins* claim, Mr. Moore filed a motion seeking permission from the Court of Appeals to file a successive habeas petition in federal district court. The motion for authorization, and the attached proposed successive petition, contained the same evidence of mental retardation that he presented in state court. On February 19, 2003, the convicting court scheduled Mr. Moore's execution for May 21, 2003. After the State filed its opposition to authorization, a staff attorney at Texas Defender Service ("TDS"), a small non-profit, non-governmental agency, provided *pro bono* assistance to Mr. Moore and obtained some of his school records.[2] Mr. Moore attached these records to his response to the State's opposition to authorization. ROA 49-52.[3] The records confirmed that Mr.

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[2] In the wake of *Atkins*, TDS lawyers attempted to assist numerous potentially mentally retarded death row inmates. TDS staff attorneys provided *pro bono* assistance to uncompensated counsel of record or became directly involved in cases where the attorney of last resort abandoned the client. *See, e.g.*, *Ex parte Hearn*, No. WR-50,116-02 (Tex. Crim. App. Mar. 3, 2004) (unpublished); *Ex parte Hines*, No. WR-40,347-02 (Tex. Crim. App. Dec. 9, 2003) (unpublished); *Ex parte Van Alstyne*, No. WR-33,801 (Tex. Crim. App. Feb. 13, 2003) (unpublished); *Ex parte Taylor*, No. WR-48,498-02 (Tex. Crim. App. Jan. 22, 2003) (unpublished); *Ex parte Clark*, No. WR-37,288-02 (Tex Crim. App. Nov. 20, 2002) (unpublished); *Ex parte Modden*, No. WR-11,364-05 (Tex. Crim. App. Sept. 11, 2002) (unpublished); *Ex parte Davis*, No. WR-40,339-05 (Tex. Crim. App. Aug. 8, 2002) (unpublished). Due to the volume of cases with execution dates, along with the lack of staff and resources, TDS was often unable to conduct the type of in-depth investigation necessary to develop *prima facie* evidence of mental retardation sufficient to satisfy the subsequent application provisions of Article 11.071. Because TDS did not become aware of Mr. Moore's case until after he had received an execution date, it did not provide any assistance to him until well after the CCA had dismissed the *Atkins* claim as abusive and the motion for authorization was pending in the Fifth Circuit.

[3] References to the Fifth Circuit Record on Appeal are noted as "__ ROA __." Citations to the transcripts of the federal evidentiary hearing are noted as "__ EH __." Citations to Mr. Moore's exhibits admitted at the hearing are referred to as "MX __ at __." Citations to the

Moore had been tested with an I.Q. of 74, when he was six years old, and revealed that he had been referred to special education classes almost immediately upon entering school. In addition, the records showed that, by the time he was in the fourth grade, Mr. Moore was functioning at only a second-grade level and that, by the fifth grade, he functioned at a third-grade level. It appears that Mr. Moore failed the fourth grade, because the records reflect that he was "promoted" to the fifth grade and was a year older than his classmates. He did not graduate from high school.

Mr. Moore reminded the Fifth Circuit about the limited scope of its review at the request-for-authorization stage and explained his attempt to develop the facts in state court:

> To require Mr. Moore to provide further proof he is mentally retarded in order to have the opportunity to demonstrate the same in the district court would ignore the plain language of the statute and would improperly place this court in the role of a trier of fact. Further support for such a claim will be developed once counsel is appointed for Mr. Moore and expert and investigative assistance is provided. Such assistance was requested in Mr. Moore's state habeas application, but was denied on unexplained procedural grounds.

Movant's Reply on Motion for Authorization at 10-11.

On May 12, 2003, the Fifth Circuit granted Mr. Moore permission to file a successive habeas petition in the District Court. Acknowledging that "[t]he facts surrounding Mr. Moore's alleged retardation have not been developed," the Fifth Circuit nonetheless found that he had presented sufficient evidence to make a *prima facie* showing that he is mentally retarded. ROA at 15-17. The Fifth Circuit granted Mr. Moore's motions to proceed *in forma pauperis* and for appointment of counsel.

State's exhibits are referred to as "SX __ at __." Citations to the appendices attached to the Petitioner's petition for writ of certiorari are referred to as "PA at __"

2. The District Court Proceedings

Mr. Moore filed his successive petition in the District Court the next day, and the court granted his motion for stay of execution. He promptly sought funding for a mental health expert to review the evidence and evaluate him, and a mitigation specialist to investigate his background, locate relevant witnesses, and determine whether he had adaptive deficits. The State opposed Mr. Moore's request for an expert and investigator, contending that any new evidence developed through such assistance would be unexhausted. In the alternative, the State argued that the District Court should provide funding only for an investigator, who would be limited to obtaining records of the I.Q. scores, school records, and head injuries mentioned in the successive state habeas petition. The District Court denied Mr. Moore's motion as premature and ordered the parties to address whether Mr. Moore should have received an evidentiary hearing in state court.

Mr. Moore argued that Texas's refusal to afford him the "tools" to present his claim of mental retardation was unexplained, arbitrary, and unconstitutional, ROA 110-01, and left him "with no avenue for relief in the State courts." *Id.* at 113. He noted that cases in which the CCA found the applicant to have met the threshold involved applicants who were financially able to retain the assistance of experts to review records and make a preliminary diagnosis of mental retardation. Mr. Moore emphasized that he did not have access to these resources. He argued that because Texas "has abdicated its responsibility to protect its citizens from unconstitutional execution, the remedy lies in this Court." *Id.* at 115. Urging the District Court to hold an evidentiary hearing, Mr. Moore explained that he did not fail to develop the facts of his *Atkins* claim in state court; through no fault of his own, the CCA deprived him of the ability to develop

the facts. Finally, he renewed his request for the tools needed to develop evidence of his mental retardation.

After some additional proceedings, the District Court concluded that Mr. Moore had not failed to develop the facts of his claim in state court and was, therefore, entitled to an evidentiary hearing. *Moore v. Dretke*, No. 6:03-cv-224 (E.D. Tex. June 8, 2004) (unpublished). The court authorized $7,500 for appointment of a mental retardation expert and social history investigator. The court also granted Mr. Moore's motion for issuance of subpoenas and payment of his lay witnesses' travel expenses related to the hearing. In the weeks leading up to the hearing, the District Court granted Mr. Moore's request for an additional $10,000 for expert services, and approved payment of over $15,000 for appointed counsel's services. The District Court approved Mr. Moore's request to conduct videotaped depositions of four additional witnesses after the hearing, and authorized payment of the court reporter transcribing the depositions. The court granted Mr. Moore's motion to provide without cost a transcript of the evidentiary hearing. Appointed counsel received an additional $17,000 for his services in the District Court, and his investigator received over $11,000 for her work. On July 1, 2005, the District Court found that Mr. Moore had established by a preponderance of the evidence that he is mentally retarded. *Moore v. Dretke*, 2005 WL 1606437 (E.D. Tex. July 1, 2005) (unpublished).

II. Facts Regarding the *Atkins* Issue

Over the course of a three-day hearing, the District Court heard testimony from eleven lay witnesses and two expert witnesses, and admitted 26 exhibits offered by the parties. The court also reviewed the depositions of four more witnesses taken after the hearing. The District Court issued a 29-page opinion assessing the evidence and concluding that Mr. Moore is mentally

retarded. PA at 64-97.

A. **Evidence of Subaverage Intellectual Functioning**

Antolin Llorente, Ph.D., a neuropsychologist, conducted a full mental retardation assessment of Mr. Moore. He administered two intelligence tests, the WAIS-III and the TONI-2. The results of the WAIS-III revealed that Mr. Moore has a full-scale I.Q. of 66, placing him within the lowest one percent of the population in terms of intelligence. 1 EH 153-54, 166; MX 1. In an attempt to estimate Mr. Moore's intellectual ability using an instrument less dependent on language and verbal reasoning, Dr. Llorente also administered the TONI-2, a test of non-verbal reasoning. 1 EH 153; MX 1. Mr. Moore obtained a score in the "Very Poor Range," placing him in the 0.8th percentile. 1 EH 154-56; MX 7 at 65. Dr. Llorente testified that the results of the TONI-2 were consistent with the WAIS-III score. 1 EH 154; *see* MX 1. Dr. Llorente also administered a test designed to detect effort to perform poorly and found that Mr. Moore was putting forth his best effort. 1 EH 159-62.

Dr. Llorente reviewed the results of the Primary Mental Abilities Test ("PMA"), given to Mr. Moore when he was six-and-a-half years old, and on which he obtained an I.Q. score of 74. 1 EH 139-40. According to Dr. Llorente, taking into account the standard error of measurement, the results of the PMA, although inflated, and the WAIS-III were consistent, and both satisfied the first element of the definition for mental retardation. 1 EH 139-41, 166-67.

Dr. Llorente also reviewed the WAIS-R administered in 1991 by Dr. Fulbright. Mr. Moore obtained an I.Q. score of 76. SX 7. The WAIS-R was the result of re-norming the WAIS in 1978, so its norms were 13 years out-of-date when Dr. Fulbright administered the test. 1 EH 176; MX 9, 10, 12. Mr. Moore's I.Q. score, therefore, was subject to the "Flynn Effect," which

recognizes that norm I.Q.'s across a population have increased approximately three points per decade. 1 EH 175-78. Dr. Llorente testified that Mr. Moore's score had to be adjusted by 3.9 points, to reflect his true I.Q. of 72.1, with a five-point standard error of measurement. 1 EH 176-78; *see* MX 9,10,12. Dr. Llorente concluded that Mr. Moore's score on the WAIS-R in 1991 was psychometrically consistent with the scores he obtained in 2004 on the WAIS-III and TONI-2. 1 EH 163, 166, 178-79. The State's expert, Gary Mears, Ph.D., conceded on cross-examination that Mr. Moore had satisfied the intellectual functioning prong of the definition of mental retardation. 3 EH 3-4.

The District Court had the benefit of extensive testimony from Dr. Llorente and Dr. Mears regarding the reliability, validity, and significance of all the intellectual functioning tests. It also had an opportunity to observe their demeanor and assess their credibility. After giving full consideration to that testimony, the District Court explicitly found Dr. Llorente more credible than Dr. Mears, PA at 90, and concluded that Mr. Moore had met the subaverage intellectual functioning prong of the definition of mental retardation. *Id.* at 73-74.

B. Evidence of Adaptive Deficits

The District Court heard an abundance of testimony concerning Mr. Moore's adaptive deficits in functional academics. The court found Mr. Moore's academic records to be "some of the most objective and enlightening evidence presented." *Id.* at 77. These records reveal that Mr. Moore attended school regularly, but he was unable to comprehend the work or benefit from instruction. MX 3; 1 EH 41-42, 61, 145; 2 EH 133-34. Mr. Moore flunked the first grade and was referred to special education. MX 3; 1 EH 67, 143-44. Kelly Moore and LaGayla Moore, Mr. Moore's sisters, were also placed in special education, and Mr. Moore was slower than both

of them. 1 EH 76. Kelly Moore, who is a year younger than Mr. Moore, assisted him with his school work, because he became frustrated trying to do it. In the third grade, Mr. Moore, who was by then at least a year older than his classmates, obtained a score on the Comprehensive Basic Skills Test that reflected that he was functioning 1.7 years below his grade level. SX 3; 1 EH 156-58; 2 EH 110. Halfway through the fourth grade, Mr. Moore scored below the third-grade level on the Metropolitan Achievement Test. MX 3; 2 EH 126-27. The next year, he was promoted to the fifth grade, despite grades at the failing level. MX 3; 1 EH 147. Mr. Moore was assigned to a corrective reading class. MX 3; 1 EH 147; 2 EH 122, 130. In the seventh month of the fifth grade, Mr. Moore attained scores on a standardized achievement test that showed he was functioning at the level of a third grader in the fourth month of the school year – more than two years below his actual grade level. MX 3; 2 EH 122, 130-32. Despite his failing grades, Mr. Moore was advanced to the sixth grade. SX 3; 2 EH 129.

If Mr. Moore attempted to read, he struggled with understanding the words and would be unable to recall what he had read when asked a short time later. 1 EH 48-49, 96. He refused to give oral reports in school, because he was ridiculed by his classmates for being slow. 1 EH 96-97. In junior high school: (1) Mr. Moore's handwriting was equivalent to that of an elementary school student (1 EH 99); when he participated in group activities, the other students in his group did the work (1 EH 100); he was unable to cut out paper stars as part of an assignment (1 EH 100-01), he could add and subtract numbers but had problems with division (1 EH 101); he was unable to tell time (1 EH 69); he was unable to follow instructions written on the blackboard (1 EH 99, 101); and he was placed in a federal program to assist disadvantaged children whose reading skills were at least two grade levels below their actual grade. 5 ROA 5.

Mr. Moore was socially promoted to the eleventh grade, as was the practice at the time in his school district. 1 EH 41, 67, 98. He eventually enrolled in a G.E.D. program, but failed to complete it. 2 EH 82. In his 1991 report, Dr. Fulbright noted longstanding verbal learning deficits, SX 7, a concern shared by Dr. Llorente. 1 EH 179. Even Dr. Mears conceded that Mr. Moore had some impairments in academic functioning and some learning disabilities. 3 EH 55-56. Dr. Llorente concluded that Mr. Moore had adaptive deficits in functional academics. 1 EH 194; 2 EH 82.

Individuals with mild mental retardation will often provide inaccurate personal histories in an effort to mask or hide their difficulties. 2 EH 98-99; 3 EH 49-50. Mr. Moore would often try to mask or hide his deficiencies, 1 EH 103, 128-29, and both Dr. Llorente and Dr. Fulbright noted that he was a poor historian. MX 1 at 3; SX 7 at 1. As a child, Mr. Moore had difficulty forming sentences and expressing himself. 1 EH 44, 66, 84. Dr. Llorente noted that Mr. Moore's speech was slow. 1 EH 199. He concluded that Mr. Moore had adaptive deficits in his communication skills. 1 EH 193, 197-98; 2 EH 73.

Mr. Moore's history reveals that he lacked the ability to form lasting or productive relationships. As a child, Mr. Moore was withdrawn and distant, a follower rather than a leader. 1 EH 64, 68-69, 102. He was taken advantage of, ridiculed, and ostracized by his classmates for being slow. 1 EH 68, 97; 3 EH 46. Dr. Fulbright noted that Mr. Moore is likely to be more malleable and prone to manipulation quite easily, SX 7, a concern shared by Dr. Llorente. 1 EH 179, 203, 209-11. Individuals with mental retardation may be vulnerable to exploitation by others. AAMR Manual at 82. Mr. Moore's father was an alcoholic who became violent toward his children when drinking. 1 EH 39-40; 6 ROA 8-9. When his father went into a drunken rage

the other children would withdraw or hide, but Mr. Moore did not understand the danger or the need to protect himself. 1 EH 40, 70-71; 6 ROA 9. His stepmother also physically abused Mr. Moore as a child, hitting him with belt buckles, extension cords, and bats. 6 ROA 10. Beginning at age nine, Mr. Moore was sexually abused by his stepmother on a daily basis. 1 EH 74; 2 EH 213; 3 EH 44-45; 6 ROA 10-12; MX 5. His stepmother gave Mr. Moore alcohol and cigarettes at that age. 6 ROA 11. Dr. Llorente concluded that Mr. Moore had significant adaptive deficits in the social skills domain. 1 EH 201-03.

The District Court evaluated the evidence related to the three domains of adaptive behavior and found that Mr. Moore had significant deficits in conceptual and social adaptive skills. The bulk of the court's memorandum opinion consists of a meticulous review of the evidence of Mr. Moore's adaptive functioning. PA at 74-95. The court provides a thorough explanation for its findings, as well as its determination that Dr. Llorente's testimony and assessment were more credible than Dr. Mears's – especially on the adaptive functioning prong:

> Dr. Llorente spent seven to eight hours interviewing and evaluating Moore, while Dr. Mears spent only two to two and a half hours. Dr. Llorente contacted and interviewed Moore's family members to learn about Moore's childhood, while Dr. Mears did not contact or interview anyone because he thought their opinions were not useful. Instead, Dr. Mears relied exclusively on his comparatively brief interview with Moore and his review of Moore's records. Dr. Llorente administered a large battery of tests to Moore. Dr. Mears also performed some tests on Moore, but not nearly as many.
>
> Additionally, Dr. Mears's assessment of Moore's academic record appears less than comprehensive. While Dr. Mears places a great deal of weight on Moore's advancement to the eleventh grade, there was no evidence that Moore was ever able to perform at the eleventh-grade level. . . . Further, Dr. Mears's description of the academic functioning of an eleven-year-old who performs below the third-grade level as "really not bad at all" seems conclusory, rather than analytical, in nature.

PA at 90-91 (footnote omitted).

The District Court described Mr. Moore's significant limitations in conceptual skills "the most striking of all his deficiencies." *Id.* at 92. The court found highly persuasive "the objective and well documented standardized achievement tests" in Mr. Moore's school records. *Id.* The court noted that substantial lay testimony substantiated Mr. Moore's academic struggles as well. *Id.* at 92-93. In addition to finding deficits in conceptual skills, the District Court concluded that Mr. Moore has significant limitations in social skills. *Id.* at 93. The court grounded its finding primarily on Mr. Moore's inability to avoid being victimized, not only by adults but by other children as well. *Id.* at 94. The court also based its finding on Mr. Moore's inability to maintain lasting social relationships. *Id.*

The District Court concluded that Mr. Moore had established by a preponderance of the evidence that he is mentally retarded. *Id.* at 97.[4] The State appealed. After the *en banc* Fifth Circuit returned the case to the panel for a review of the merits, a divided panel held that the District Court had not committed clear error in finding Mr. Moore mentally retarded. *Moore v. Thaler*, No. 05-70038, 2009 WL 2573295 (5th Cir. Aug. 21, 2009) (unpublished) (PA at 1-58).

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[4] The parties did not dispute the final element of the definition of mental retardation, PA at 96-97, and the State raised no complaint below about the District Court's finding that Mr. Moore manifested significant limitations in intellectual and adaptive functioning before the age of 18.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD NOT GRANT PLENARY REVIEW TO ADDRESS THE CORRECTNESS OF THE UNANIMOUS, *PER CURIAM* OPINION OF THE *EN BANC* COURT OF APPEALS, BECAUSE THE CLASS OF SIMILARLY-SITUATED *ATKINS* COMPLAINANTS WHO WOULD BE AFFECTED BY A DECISION IS MINUSCULE OR NON-EXISTENT, AND THE RESPONDENT WOULD LIKELY PREVAIL ON OTHER GROUNDS THAT THE COURT BELOW NEVER ADDRESSED.

A. A decision by this Court would be unlikely to affect any other cases in Texas, let alone have a national impact.

Every single member of the 17-judge *en banc* Court of Appeals concluded that, because Texas had no published case law setting out the standards for raising an *Atkins* claim at the time Mr. Moore filed his successive state habeas petition, he met the cause-and-prejudice exception to procedural default. PA at 62-63. The *en banc* court issued a *per curiam*, five-page opinion. Clearly, such a ruling is not indicative of an issue that has caused confusion, dissension, or vexation among the lower courts. At a minimum, it is a strong basis for denying review that the Petitioner has utterly failed to show any disagreement among the judges of the court below regarding the precise legal issue it insists this Court should expend its limited resources to consider.

Despite the Petitioner's hyperbolic assertion that the opinion of the *en banc* Court of Appeals will have "wide-reaching" implications, Petition at 24, it is likely that no one other than Mr. Moore will be affected by the decision. The cause-and-prejudice ruling of the Court of Appeals will apply only to those inmates (1) who had already been sentenced to death and had filed their initial habeas petition in state court before this Court decided *Atkins*; and (2) who had

raised a successive *Atkins* claim in state court prior to February 26, 2003, the day the Texas Court of Criminal Appeals ("CCA") handed down its unpublished decision in *Ex parte Williams*, No. WR-43,907-02, 2003 WL 1787634 (Tex. Crim. App. 2003). On June 20, 2002, the day the Court decided *Atkins*, this class of prisoners definitively closed. Given the typical interval between sentencing and the filing of state habeas application, however, this class more likely closed several years prior to the decision in *Atkins*.

The court below recognized that the "unique circumstances" of Mr. Moore's case satisfied cause and prejudice. PA at 62. If any other inmates besides Mr. Moore are so precisely positioned to benefit from the *en banc* court's ruling, Counsel for Respondent is unaware of who they may be. Because the question presented is founded on these "unique circumstances," it simply has no jurisprudential or practical significance that calls out for this Court's intervention.

This case's singularity may also be explained by its protracted procedural path in the Court of Appeals after the District Court granted relief on the *Atkins* claim. On June 29, 2006, a divided panel of the Court of Appeals concluded that Mr. Moore had failed to exhaust his *Atkins* claim, vacated the judgment, and remanded the matter to the District Court with instructions to dismiss without prejudice. *Moore v. Quarterman*, 454 F.3d 484, 494 (5th Cir. 2006). Mr. Moore petitioned the appellate court for rehearing *en banc*. The Court of Appeals did not rule on the petition for almost an entire year. On June 27, 2007, a divided panel treated the petition for rehearing *en banc* as a petition for panel rehearing, withdrew its earlier opinion, and substituted a new one. *Moore v. Quarterman*, 491 F.3d 213 (5th Cir. 2007). With few substantive changes, two judges again found that Mr. Moore had failed to exhaust his *Atkins* claim. However, instead of dismissing the claim without prejudice while Mr. Moore returned to state court, the majority

dismissed the claim ***with*** prejudice, because it concluded that Mr. Moore had defaulted his state-court remedies. *Id.* at 215. Mr. Moore, once again, filed a petition for rehearing *en banc*. On March 12, 2008, the Court of Appeals granted his request. On June 26, 2008, the *en banc* court unanimously found that Mr. Moore had demonstrated cause and prejudice for his failure to exhaust. *Moore v. Quarterman*, 533 F.3d 338 (5th Cir. 2008) (*en banc*).

In short, this case presented the *en banc* Court of Appeals with a unique situation, highly unlikely ever to occur again: the dismissal with prejudice of an *Atkins* claim ***after*** the district court had conducted an evidentiary hearing and found the prisoner to be mentally retarded. Any principle the Court might announce in this case would have no prospective application to the administration of capital punishment in Texas, let alone across the Nation. This Court's intervention is unwarranted.

B. <u>The judgment below would likely be affirmed on other grounds.</u>

The *en banc* Court of Appeals avoided – or never reached – several exhaustion arguments that Mr. Moore raised in addition to cause-and-prejudice. Consequently, even if this Court were to grant review and reverse the judgment below, it is likely that Mr. Moore would prevail on other grounds. Under these circumstances, there is little compelling reason for this Court to grant certiorari.

Besides his cause-and-prejudice argument, Mr. Moore advanced three other procedural arguments in the court below. First, he asserted that he had properly exhausted his *Atkins* claim. With specific citations to the trial record and testimony of a psychiatrist, Mr. Moore alleged in his state habeas application "that [he] was clearly below average intelligence," that school tests showed he had an I.Q. of 74, and that this score was within the range for mental retardation.

Based on the psychiatrist's testimony, Mr. Moore alleged that he was in special education throughout school, that he had multiple head injuries that compounded his low level of intellectual functioning, and that he demonstrated behavior consistent with damage to the temporal lobes. Mr. Moore explicitly called to the state court's attention that this Court had ordered the states to develop ways to enforce *Atkins*, and that Texas had not yet implemented any procedures. Moreover, he reminded the state court of his indigence, and asked it to grant him an opportunity to be evaluated. He also asked the state court to "allow him a constitutionally sufficient period within which to file such amendments to [his] application as may be necessary to bring all proper matters before the Court and avoid unnecessary piecemeal litigation," and to hold an evidentiary hearing. In a separate pleading, Mr. Moore sought appointment of counsel "to prepare and file a successor writ of habeas corpus."

Mr. Moore contended that he neither withheld essential facts from the state court in an attempt to expedite federal review, nor did he intentionally forego any opportunity provided by the state court to develop the facts of his claim. His requests made it clear that he needed qualified, compensated counsel, along with additional resources, to help him investigate and develop the facts in support of his *Atkins* claim. He never suggested that he could prevail on his claim based solely on the evidence he presented in his successive state habeas petition. To hold that a claim supported by facts newly developed in federal court is unexhausted when the prisoner's inability to develop the facts resulted from the state court's refusal to grant him counsel, funding, or an evidentiary hearing – rather than from his lack of diligence – turns the principle of comity on its head, Mr. Moore argued. The exhaustion doctrine respects the integrity of the state courts by giving them the first opportunity to adjudicate alleged violations of federal

constitutional rights, he asserted, but it was never intended to allow the state courts to thwart federal habeas review by refusing to allow any factual development.

In a second, and related, argument below, Mr. Moore contended that, even if the *en banc* Court should conclude that he failed to exhaust the available state-court remedies, it should excuse exhaustion because circumstances rendered the State corrective process ineffective to protect his federal constitutional rights. He argued that, without the right to appointed, compensated counsel or fact-development resources under the Texas successive post-conviction procedures, indigent death row inmates who truly may be mentally retarded are unlikely to make the requisite showing of mental retardation that triggers resources and a remand to the trial court for further proceedings to resolve the claim. *Cf. McFarland v. Scott*, 512 U.S. 849, 856 (1994) (holding that federal habeas appointment statute allows for pre-petition appointment of counsel and assistance of investigators and experts); *In re Hearn*, 376 F.3d 447, 455 (5th Cir. 2004) (holding that, upon a "colorable showing" of mental retardation, the federal habeas appointment statute affords counsel to a death row inmate to investigate and prepare a motion for authorization to file a successive petition raising an *Atkins* claim); *id.* at 458 (Higginbotham, J., concurring) ("I am not prepared to hold that [a death row inmate] must first make a *prima facie* case that he is retarded to be entitled to a lawyer to make that case."). Texas's failure to appoint and compensate post-conviction counsel, or provide some fact-development resources for cases like Mr. Moore's demonstrates that the state corrective process was ineffective to protect his *Atkins* right. *See* 28 U.S.C. § 2254(b)(1)(B). The rule of exhaustion is founded on the assumption that a state's judicial process is entitled to respect from the federal courts precisely because state remedies are adequate and effective to vindicate federal constitutional rights. It

was never intended to permit the state courts to put a choke-hold on federal review of constitutional violations.

Third, Mr. Moore argued below that, because the District Court found that he is mentally retarded, he could overcome any procedural default by showing a fundamental miscarriage of justice – that he is actually innocent of the death penalty. *See Sawyer v. Whitley*, 505 U.S. 333 (1992). Mr. Moore asserted that applying procedural default to a meritorious *Atkins* claim serves no legitimate purpose when the Constitution itself deprives the State of the power to impose capital punishment on a certain class of persons. The "fundamental miscarriage of justice" exception recognizes that, under these extraordinary circumstances, the societal interests of finality, comity, and conservation of scarce judicial resources must yield to the imperative of correcting a fundamentally unjust punishment.

The *en banc* Court of Appeals found it unnecessary to resolve "the reasonable arguments [that] can be made for and against Moore's satisfaction of the exhaustion requirement," because "even if Moore failed to exhaust, the unique circumstances here establish cause for his default and prejudice in the absence of federal court review." PA at 62.[5] For the same reason, it did not need to address the "fundamental miscarriage of justice" exception. *Id.* at 62 n.4. Consequently, even if this Court were to reject the *en banc* court's cause-and-prejudice holding, it is likely that Mr. Moore would prevail on one of the additional grounds never reached below. It makes little sense for this Court to spend its valuable time addressing an issue that is not outcome determinative.

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[5] In finding that Mr. Moore had met the "prejudice" prong of the cause-and-prejudice standard, the *en banc* court noted that "Moore's mass of evidence, taken at face value, presented a substantial *Atkins* claim." PA at 63.

II.

THIS COURT SHOULD NOT DEVOTE ITS LIMITED RESOURCES TO DETERMINE WHETHER TEXAS HAS ADOPTED A BRIGHT-LINE CUT-OFF I.Q. SCORE OF 70, BECAUSE THE STATE NEVER RAISED THE ARGUMENT BELOW; THE TEXAS COURT OF CRIMINAL APPEALS OR THE TEXAS LEGISLATURE CAN CLARIFY ANY PERCEIVED MISINTERPRETATION OF STATE LAW IMPLEMENTING *ATKINS*; AND THE UNPUBLISHED DECISION OF THE COURT OF APPEALS IS BINDING ON NO ONE BUT THE PARTIES.

A. **The Petitioner failed to raise the issue in the court below.**

Quoting *Ex parte Briseno*, 135 S.W.3d 1, 7-8 & n.24 (Tex. Crim. App. 2004), the Petitioner asserted in the court below that Texas law defines significantly subaverage intellectual functioning as an I.Q. of "***about*** 70 or below." State's Supplemental Brief at 9 (emphasis added). Now, before this Court, the Petitioner wishes to piggyback onto the argument the dissent advanced below: that Texas, in implementing *Atkins*, has adopted a bright-line cut-off I.Q. of 70 necessary to satisfy the first element of the diagnosis for mental retardation. *See* PA at 33 ("Moore was therefore required to prove that his I.Q. is below a bright-line cut-off of 70. Such a finding could be made ***in spite of***, but not ***because of***, I.Q. measurements above 70.") (emphases in original). The Petitioner never made the argument below that the District Court and the Court of Appeals misinterpreted Texas law by finding that Mr. Moore suffered from significantly subaverage intellectual functioning with his most probative I.Q. scores being ***over*** 70.

The Petitioner failed to raise the bright-line cutoff argument below. The Court of Appeals did not expressly address or decide the question on which the Petitioner now seeks certiorari review. Responding in a footnote to the dissent's raising of the bright-line cut-off argument, the majority confirmed that the Petitioner never made the argument and that, therefore,

the court "found no reason to address it." PA at 10 n.5. The majority noted its reluctance "to create new law in this area where the parties fail to identify or address these novel issues." *Id.* at 11. Accordingly, this Court should not consider it either. *See Meyer v. Holley*, 537 U.S. 280, 291 (2003) (refusing to address issues not directly decided by the court of appeals).

B. The Texas courts or the Texas legislature can clarify any perceived misinterpretations of state law implementing *Atkins*.

In the wake of *Atkins*'s express pronouncement that left to the states the details of enforcing the Eighth Amendment prohibition, states have responded to that challenge by adopting their own measures for adjudicating claims of mental retardation. As a consequence, this Court should deny the Petitioner's request that it micro-manage, fine-tune, and federalize every aspect of Texas's procedures for raising and resolving *Atkins* claims. The Court of Appeals recognized that the Texas courts should clarify the state's definition of mental retardation, if it is indeed open to misinterpretation:

> The [dissent's] criticism that the majority fails to take the opportunity to "make sense of Texas's jurisprudence regarding retardation . . . and to provide guidance" is misplaced. [T]he ultimate responsibility for providing guidance and clarifying the relevant standards, especially to the degree that such "clarification" actually calls into question the language articulated in *Atkins* and in *Briseno*, rests with the Texas courts, not with us. *See Atkins*, 536 U.S. at 317 ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.")[.]

PA at 10-11 n.5. The dissent begrudgingly concurred: "[B]ecause, under *Atkins*, the states are left to fashion their own response to that decision, the majority's mangling of Texas legal standards is subject to ready correction by the [Texas Court of Criminal Appeals] or the legislature." *Id.* at 57-58. Moreover, even the Petitioner concedes that the Texas courts are better situated to resolve the "state-law question[]" of whether Texas has established a bright-line

cut-off I.Q. score in its implementation of *Atkins*. Petition at 25 n.7.[6] For this reason, the Court should decline to review the second question presented.

C. **The decision below has no precedential value.**

Certiorari should be denied because the question presented is unworthy of this Court's attention. *See* Sup. Ct. R. 10 ("[C]ertiorari will be granted only for compelling reasons"). The Court of Appeals was sufficiently confident that it had correctly decided Mr. Moore's case on the basis of well-settled principles of law that it chose to express its ruling in an unpublished *per curiam* opinion. *See* PA at 1 n.*; 5th Cir.R. 47.5 ("[O]pinions that may in any way interest persons other than the parties to a case should be published."). Unpublished opinions released by the Fifth Circuit after January 1, 1996, are not precedent (except under limited circumstances not applicable here). 5th Cir.R. 47.5.4. The dissent twice noted that the court's ruling had no precedential value. *See* PA at 18 ("The only mitigation is that the majority opinion is unpublished, so it is not binding on anyone or any court."); *id.* at 57 ("The only redeeming feature of the majority's misguided opinion is that . . . it is unpublished and therefore binding as precedent on no one except the parties to this case as it affects only this case."). Nonetheless, even if the decision of the Court of Appeals were debatable, it would not present a compelling reason for this Court's review, because a ruling reversing the judgment would amount only to error correction in a single case. *See* Sup. Ct. R. 10 (cautioning that "certiorari is rarely granted

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[6] Finally, it is worth noting that the Court of Appeals quoted the same passage in *Briseno* as did the State in its Supplemental Brief that defines significantly subaverage intellectual functioning as an "I.Q. of ***about*** 70 or below." PA at 10 n.5 (emphasis added by Court of Appeals). As the Court of Appeals pointed out (in *dicta*), such a phrasing from the leading Texas case implementing *Atkins* hardly suggests that Texas has adopted a bright-line cut-off I.Q. score. *Id.*

when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). The second question presented does not demand this Court's review.

CONCLUSION

Mr. Moore asks the Court to deny the petition for writ of certiorari.

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No. 09-627

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2009

RICK THALER, Director,
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Correctional Institutions Division,

Petitioner,

V.

ERIC LYNN MOORE,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent's Brief in Opposition was served on Counsel for Petitioner on this 1st day of February 2010, via First Class United States Mail, addressed to:

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